UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

PROFESSIONAL TRANSPORTATION, INC.

Employer

and

Case 32-RC-259368

UNITED ELECTRICAL, RADIO, AND MACHINE WORKERS OF AMERICA (U.E.), LOCAL 1077

Petitioner

REGIONAL DIRECTOR'S DECISION OVERRULING OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

Based on a petition filed on April 21, 2020[1] and pursuant to the parties' Stipulated Election Agreement, an election was conducted by mail from May 15 to June 5 to determine whether a unit of driver employees of Professional Transportation, Inc. (the Employer) wish to be represented for purposes of collective bargaining by United Electrical, Radio, and Machine Workers of America (U.E.), Local 1077 (Petitioner). That voting unit consists of:

> All full-time and regular part-time road drivers and yard drivers employed by the Employer at or out of the Union Pacific rail yards located in Bakersfield, Dunsmuir, Fresno, Lathrop, Oakland, Portola, Roseville, San Jose, and Stockton, California and Sparks and Winnemucca, Nevada, who were employed by the Employer during the payroll period ending April 21, 2020; excluding confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

The tally of ballots prepared on June 10 shows that of the approximately 113 eligible voters, 42 votes were cast for and 27 votes were cast against the Petitioner, with five challenged ballots, a number that is insufficient to affect the election results.

THE EMPLOYER'S OBJECTIONS

On June 16, the Employer timely filed Objections to Union Conduct Affecting Election (Objections) and an offer of proof in support thereof. A copy of the Employer's Objections is

[1] All dates refer to calendar year 2020.

attached hereto, and after first setting forth the Board's standards for setting aside elections and for evaluating offers of proof, I address them below, summarizing the allegations contained therein.

Board Standards for Setting Aside Elections and for Evaluating Offers of Proof

"Representation elections are not lightly set aside" *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citations omitted) and "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Id.* at 328. The objecting party bears the "entire burden" of showing evidence that misconduct warrants overturning the election. *Id.* at 328. The burden of proof is on the party seeking to set aside a Board-supervised election, and that burden is a "heavy one." *Lalique N.A., Inc.,* 339 NLRB 1119, 1122 (2003); *Chicago Metallic Corp.,* 273 NLRB 1677, 1704 fn. 163 (1985). The objecting party's burden encompasses every aspect of a *prima facie* case. *Sanitas Service Corp.,* 272 NLRB 119, 120 (1984).

The standard used to determine whether objectionable conduct occurred varies depending upon who is alleged to have committed the misconduct. Where, as here, the objecting party alleges that the other party to the election, or its agent, committed the objectionable conduct, the objecting party must show not only that the acts occurred by the other party's agent, but also that they "interfered with the employees exercise of free choice to such an extent that they materially affected the results of an election." *NLRB v. Gulf States Canners,* 634 F.2d 215, 216 (5th Cir. 1981). *See Cedars-Sinai Medical Center,* 342 NLRB 596, 597 (2004) (citing *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995) -conduct is objectionable "if it has the tendency to interfere with the employees' freedom of choice.").

Section 102.69(a) of the Board's Rules and Regulations provides that when filing objections to an election, the objecting party must include a short statement of the reasons for the objections, and an offer of proof in the form described in Section 102.66(c). Section 102.66(c) of the Board's Rules and Regulation provides that the offer of proof shall identify "each witness the party would call to testify concerning the issue and summarizing each witness testimony." If the Regional Director determines that the evidence described in an offer of proof is insufficient

to sustain the proponent's position, the evidence shall not be received. If the Regional Director determines that the evidence described in an offer of proof accompanying objections "would not constitute grounds for setting aside the election if introduced at a hearing, the Regional Director shall issue a decision disposing of the objections." Section 102.69(c)(1)(i) of the Board's Rules and Regulations. See also NLRB Casehandling Manual, Part Two- Representation Proceedings, Sec. 11395.1.

The Board places the burden on the objecting party to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election. *Jacmar Food Service Distribution,* 365 NLRB No. 35, slip. op. 1, fn. 2 (2017), citing *Transcare New York, Inc.,* 355 NLRB 326 (2010). The Board has long held that an objecting party must provide probative evidence in support of its objections; it is not sufficient to rely on mere allegation, conclusory statements, or suspicion. *See Allen Tyler & Son, Inc.,* 234 NLRB 212, 212 (1978) ("In the absence of any probative evidence, [the Board] shall not require or insist that the Regional Director conduct a further investigation simply on the basis of a 'suspicious set of circumstances"). In short, to merit investigation by a regional director and to warrant a hearing, the offer of proof must be "reasonably specific in alleging facts which *prima facie* would warrant setting aside an election." *Audubon Cabinet Company,* 119 NLRB 349, 350-351 (1957); *Care Enterprises,* 306 NLRB 491 (1992). The Board has repeatedly upheld Regional Directors' decisions to overrule objections when the supporting offer of proof is deficient. See e.g., *Builders Insulation, Inc.,* 338 NLRB 793 (2003); *The Daily Grind,* 337 NLRB 655 (2002) (unsupported allegations are insufficient to trigger administrative investigations); *Heartland of Martinsburg,* 313 NLRB 655 (1994); *Holladay Corp.,* 266 NLRB 621 (1983); *North Shore Ambulance,* 2017 WL 1737910 (NLRB) (May 3, 2017) (Citing *Park Chevrolet-Geo, Inc.,* 308 NLRB 1010, 1010 fn. 1(1992), and Secs. 102.69(a) and 102.69(c)(1)(i) of the Board's Rules and Regulations, wherein the Board held that the Regional Director properly overruled the Employer's Objection "without a hearing based on the Employer's deficient offer of proof').

In *XPO Logistics Freight, Inc.,* 2017 WL 1294849, fn. 1 (Apr. 6, 2017), the Board denied the employer's request for review of the Regional Director's decision overruling objections and issuing a certification of representative where the employer's evidence in support of its

objections failed to "constitute grounds for setting aside the election if introduced at a hearing under Sec. 106.67 (c)(1)(i)." With respect to one of the objections in that case, the Board noted that the employer "neither identified the alleged Union agents or supporters who purportedly threatened employees into supporting the Union, nor specified the objectionable statements they assertedly made." *Id.* The Board went on to explain that its conclusion that the employer's offer of proof was deficient "stems not from its failure to submit a voluminous offer of proof, but from the Employer's failure to allege and support conduct which, if credited, *would* warrant setting aside the election." Citing NLRB Casehandling Manual, Part Two- Representation Proceedings, Sec. 11395.1. (emphasis in original).

In *XPO Logistics Freight, Inc.,* 365 NLRB No. 105. fn. 1(2017), the test-of-certification case that arose after the Board's denial of the employer's request for review, supra, the Board granted the General Counsel's motion for summary judgment. The employer then appealed the Board's decision to the Court of Appeals for the District of Columbia. In denying the employer's petition for review that challenged the Board's decision to overrule its objections without a hearing in the underlying representation case, the D.C. Circuit noted that an evidentiary hearing is "called for only when a party makes a *prima facie* showing of substantial and material issue of fact, which if true, would warrant setting aside the election." *XPO Logistics Freight, Inc. v. NLRB,* 2018 WL 2943938, *2 (D.C. Cir. May 25, 2018) (citations omitted). The Court also noted that the *prima facie* showing "cannot be conclusory" and must "point to specific events and specific people." *Id.* (citations omitted). It therefore agreed that the employer's offer of proof was "devoid of factual specifics about who said or did what to whom that, if credited by a factfinder," could support a determination that the conduct was coercive. *Id.*

Objection 1:

Employer's Objection 1 alleges that Petitioner agents "improperly solicited and offered to collect mail ballots" from employees.

Offer of Proof:

In its offer of proof in support of this Objection, the Employer identified two employee witnesses, one manager witness, and produced copies of email and text-message correspondence.

The first employee witness (Witness # 1) would testify to receiving at least two voicemails and a text message from alleged Petitioner agents asking her if she needed help with her ballot or if she "needed help getting (the ballot) sent back one way or the other." The Employer submitted a copy of the transcripts of two voicemail messages to support this proffered testimony, as well as a copy of a text message from one alleged Petitioner agent, which posed the question of whether this witness still intended to vote for the Petitioner.[2]

The transcripts of the voicemail messages read, in pertinent part:

Hi (Witness #1), it's (alleged agent #1) from the Union. I'm just calling to see if you have received your ballot yet from the labor board. They should be coming today or tomorrow. So, give me a call back and let me know if you have.

Hi (Witness #1), this is (alleged agent #2). I'm from the — I'm from the Union. I talked to you in the yard a couple times and I just wanted to see if you got, if you guys got your ballot today. If you can give me a call back. My number is (redacted). And if need help filling it out, not filling it out, but if you need help on getting it sent back one way or the other, l can help you with that. Just because it's so complicated.

The Employer's offer of proof summarized the second employee witness's (Witness # 2) testimony in conclusory fashion. He would testify generally that an alleged, unidentified Petitioner agent called him and offered to help him complete his mail ballot and to collect and return the ballot for him. There are no specific facts proffered regarding the identity of the caller or what was actually said.

The manager witness would testify that Witness #2 reported to him his conversation with the unidentified Petitioner agent. The manager then reported that conversation to another management official by e-mail, dated May 20. The e-mail reads, in relevant part:

(Witness #2) called me today asking about the vote. He asked me if it was secret ballot. I advised him yes, it is and that he doesn't have to tell anyone if and or how he voted. He said he got a call for (sic) a guy from the union telling him that the

[2] The text message is not included herein because merely asking an employee if s/he continues to support Petitioner, without more, is not objectionable conduct. See e.g., *Fessler & Bowman*, infra.

ballots are out and are confusing to fill out and wanted (Witness #2) to call him when he gets it so they could walk him thru filling out the ballot. I inform Joseph that No one can fill out the form for him. No one can tell him how to do it and that no one else can pick it up and or mail it for him. I told him that the instruction for filling it out are in the letter from the NRLB and in the email that Steve sent out.

Analysis:

The alleged conduct in this Objection; namely, offers to assist voters in filling out ballots and to collect ballots for delivery, typically arises in the context of face-to-face interactions, such as home or jobsite visits by union agents. By way of recent example, in *Grill Concepts Services, Inc. d/b/a/ The Daily Grill*, 2019 WL 2869823 (June 28, 2019), the Board was faced with nearly identical alleged objectionable conduct. In determining whether the alleged offers of assistance were coercive and interfered with employee free choice, it analyzed the conduct under the "union home visits" framework. The Board, at page 1, summed up the case law as follows:

> Generally speaking, union home visits during election campaigns are lawful and unobjectionable as long as the visitors do not threaten or coerce eligible voters during the visits. *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957), revd. on other grounds, 133 NLRB 1092 (1961). If objectionable threats or coercion occur during home visits, the Board follows its usual practice of applying an objective standard in evaluating whether a party's conduct had the tendency to interfere with employee free choice in the election and thus warrants setting the election aside. See, e.g., *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Phillips Chrysler Plymouth*, 304 NLRB 16, 16 (1991). The objecting party bears the burden of demonstrating that objectionable misconduct occurred and that it warrants setting the election aside. *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2005); *Consumers Energy Co*., 337 NLRB 752, 752 (2002).

The Board went on to cite the decision in *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004), in which the Board unanimously found ballot collection during a union's jobsite visits to constitute objectionable conduct. Relying on that decision, the Board found no objectionable conduct because no employees actually handed their ballots over to the union. The same is true here. However, the inquiry doesn't end there. The Board also considered whether mere (unsuccessful) mail-ballot solicitation constituted objectionable conduct, noting that the *Fessler & Bowman* Board split on that issue. Finding that no objectionable solicitation occurred, but without resolving the legal question, the Board concluded that the conflicting and ambiguous

testimony failed to establish "that the Petitioner's representatives sought to *physically* assist voters in filling out the ballot, sought to have the voters record their votes *in the representatives' presence*, or engaged in any other conduct that could reasonably be viewed as coercive or imperiling the integrity of the mail ballots in this election." *Emphasis added*. The same fact pattern is present here. There is no allegation or offer of proof suggesting that Petitioner agents sought to provide in-person assistance. Rather, all of the correspondence refers to alleged Petitioner agents seeking a return call for their assistance.

To be sure, the Board has yet to find mere mail-ballot solicitation during home visits or other in-person encounters to be coercive and thus objectionable; much less mere solicitation by telephone or text message. As noted above, the Board in *Fessler & Bowman* split on the issue of whether mere solicitation by telephone was objectionable, and as a result, did not find it to be. *The Daily Grill* Board, whether it intended to or not, seemed to suggest that mere ballot solicitation would be objectionable if it occurred in person. Whatever its intent, it did not resolve the legal question, and I am constrained to apply extant law. Thus, even accepting the Employer's offer of proof at face value, Board precedent compels the overruling of Objection 1, irrespective of its value. However, should the Board review this Decision and wish to consider the issue of mere mail-ballot solicitation by telephone, I would overrule Objection 1 on the additional basis that the offer of proof is insufficient to raise material and substantial issues of fact that would warrant a hearing, much less make a *prima facie* showing that mail ballot solicitation occurred.

Beginning with Witness #1, that voter would testify to receiving the above voicemail messages from two alleged Petitioner agents in which one offered to help with "not filling it out….but getting it back one way or the other….because it's so complicated." I find this telephonic offer to assist to be too ambiguous to constitute ballot solicitation of any kind, and far too ambiguous to be considered coercive. Depositing an envelope in the mail is not complicated, suggesting to the listener that the complication might lie elsewhere; peradventure the voting instructions. Whatever the intended meaning of the offer, it is well established that "'the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct."' *Picoma Industries, Inc.*, 296 NLRB 498, 499 (1989), quoting *Beaird-Poulan Division*, 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). "Rather, the test is based on an objective standard." *Id.* See also *Teamsters Local 299*

(Overnite Transportation Co.), 328 NLRB 1231 fn. 2 (1999). Thus, even assuming for the sake of analysis that Witness #1 subjectively construed the offer to assist as coercive; when viewed objectively and in context, it was too ambiguous to reasonably be construed as a solicitation of the voter's ballot or as otherwise coercive.

Turning to Witness #2, no specific testimony was offered. Rather, the Employer offered a conclusory summary of his testimony; i.e. that an unidentified Petitioner agent called and offered to assist him in filling out his ballot and to collect and return his ballot for him. Missing are the "factual specifics about who said or did what to whom that, if credited by a factfinder, could support a determination that the conduct was coercive." *XPO Logistics Freight, Inc. v. NLRB*, supra. The offer of proof with respect to Witness #2 is therefore deficient. It does not contain the specifics necessary to warrant a hearing, much less set aside the election results. The only details offered in this regard came through the manager witness's e-mail to another manager, reporting what Witness #2 told the manager witness. In that e-mail, the manager witness explained that Witness # 2 told him that an unidentified Petitioner agent called him and asked for a return call so he could "walk him though filling out the ballot" because they are "confusing to fill out." There is nothing more regarding the hearsay exchange between Witness #2 and the alleged, unidentified Petitioner agent in this email. Indeed, the only mention or notion of someone else "filling out the form" and "picking up or mailing" the ballot for Witness #2 came from the manager witness himself. According to the e-mail, Witness #2 made no mention of such solicitations, and as discussed above, the offer of proof regarding Witness #2 lacks the requisite specificity to warrant a hearing. Taken together, the alleged "facts" offered in support of Objection 1 fall far short of making a *prima facie* showing of objectionable conduct. Accordingly, a hearing is not warranted, and I am overruling Objection 1.

Objection 2:

Employer's Objection 2 alleges that the Petitioner spread false and misleading propaganda to employees in order to influence their votes, including guarantees of annual wage increases. One employee complained about receiving a stack of fliers bearing such alleged misrepresentations. The offer of proof included one such Petitioner flier.

Analysis:

This offer of proof likewise fails to raise substantial and material factual issues that would warrant a hearing. In cases of alleged campaign misrepresentations, the Board applies the

longstanding *Midland* standard under which it will not probe into the truth or falsity of the parties' campaign statements and will not set aside an election on the basis of misleading statements unless "a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland National Life Insurance Co*., 263 NLRB 127 (1982). The *Midland* standard is premised on a "view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." Id. at 132, quoting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977).

Here, the Employer does not assert, nor offer any proof, that Petitioner forged any documents that would render the voters unable to recognize propaganda for what it was. The alleged guarantee of yearly wage increases is precisely the type of message that the Board will not scrutinize. See the Board's recent affirmation of *Midland* in *Didlake, Inc*., 367 NLRB No.125 (2019)(employer misstatements of the law are also not objectionable).

Based on the above, I overrule Objection 2.

CONCLUSION AND ORDER

I have overruled the Employer's Objections in their entirety for the reasons set forth above and in accordance with Section 102.69(c)(1)(i) of the Board's Rules and Regulations and Section 11395.1 of NLRB Casehandling Manual, Part Two- Representation Proceedings. Accordingly, I HEREBY issue the following:

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for United Electrical, Radio, and Machine Workers of America (U.E.), Local 1077, and that it is the exclusive collective-bargaining representative of all the employees in the following appropriate bargaining unit:

> All full-time and regular part-time road drivers and yard drivers employed by the Employer at or out of the Union Pacific rail yards located in Bakersfield, Dunsmuir, Fresno, Lathrop, Oakland, Portola, Roseville, San Jose, and Stockton, California and Sparks and Winnemucca, Nevada; excluding confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor

Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by July 23, 2020.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: July 9, 2020

Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32